Supreme Court, U.S.
FILED

No. 04-1128

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In The Supreme Court of the United States

LOUIS JOSEPH PLEETER,

Petitioner,

v.

KAREN BOOKBINDER,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented to this Court involve the Bankruptcy Code and are twofold: First the decision by the 11th Circuit Court of Appeals conflicts with decisions of the 1st, 2nd, 5th, 6th, 7th and 10th Circuit Courts of Appeals regarding the standard for measuring when a fiduciary breach is a "defalcation" under 11 U.S.C.§523(a)(4)[1]; and second, whether the 11th Circuit Court of Appeals can disregard a state appellate court's determination in deciding whether a debtor is a fiduciary under 11 U.S.C.§523(a)(4)[2].

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[1]Bankruptcy Code §523 contains a number of exceptions to discharge of a debt. §523(a)(4) provides that there is no discharge of an individual debtor from any debt: "for fraud or *defalcation while acting in a fiduciary capacity,* embezzlement or larceny."Emphasis added.

[2] See footnote 1 *supra.*

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Eleventh Circuit.

The petitioner here and the appellant below is Louis Joseph Pleeter, pro se.

The appellee below and respondent is Karen Bookbinder.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(6), the following list identifies all corporations appearing here and before the United States Court of Appeals for the Eleventh Circuit.

Bashert Enterprises, Inc. and Eve Medical Corporation are respondents and were appellees below. These corporations are wholly-owned by Karen Bookbinder and are not publicly held.

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OPINIONS BELOW

The opinion of the Court of Appeals is not published and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a.- 4a. The District Court's opinion is reported at 293 B.R. 812 (Bnkr. S.D. Fla.2003) and is reprinted at Pet. App. 5a.-13a. The opinion of the Third District Court of Appeal of the State of Florida is reported at 800 So. 2d 657 (Fla. 3d DCA 2001) and is reprinted at Pet. App. 14a.-19a.

JURISDICTION

The Court of Appeals entered its judgment on October 15, 2004. The petition for rehearing was denied on November 23, 2004. The court's order is reprinted at Pet. App. 20a. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves a provision of the Bankruptcy Code, 11 U.S.C.§523(a)(4).

STATEMENT OF THE CASE

This case strikes at the very heart of Bankruptcy Code §523(a)(4). It involves the question of the definition of fiduciary for §523(a)(4) purposes as well as the standard for "defalcation" when there has been a previous determination that a breach of fiduciary duty occurred.

1. Petitioner, Pleeter was found to have breached a fiduciary duty to Respondent, Karen Bookbinder and her wholly-owned corporations, Bashert Enterprises, Inc and Eve Medical Corporations ("Bookbinder and Co.s") by jury verdict in a trial court in Miami-Dade County, Florida, which

resulted in a judgment in favor of Bookbinder and Co.s against Pleeter. The verdict form did not contain any findings of fact.

2. Pleeter appealed the jury's verdict to the Third District Court of Appeal of Florida on the basis that there was no substantial competent evidence to support the jury's verdict The Florida appellate court determined that Pleeter's fiduciary duty arose when he voluntarily paid Bashert Enterprises, Inc.'s first mortgage payment and breached his duty when he unilaterally recalled the payment, thus injuring Bashert Enterprises, Inc. The Florida appellate court cited Florida's leading case dealing with trusts that are impliedly created as authority for its holding[1] The Florida Supreme Court decided not to review the Florida Third District Court of Appeal's decision

3. Shortly thereafter Pleeter filed a petition under Chapter 7 of the Bankruptcy Code to discharge his debts including the Bookbinder and Co.s' judgment. Bookbinder and Co.s filed an adversary proceeding in the bankruptcy case to prevent Pleeter from discharging the judgment. In the adversary proceeding both Pleeter and Bookbinder and Co.s moved for summary judgment. The District Court granted Bookbinder & Co.s' motion and denied Pleeter's. Pleeter appealed to the 11th Circuit Court of Appeals which affirmed the District Court's order.

REASONS FOR GRANTING THE WRIT

There are two separate and distinct issues before this Court which require resolution.

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[1]*Capital Bank v. MVB, Inc.*, 622 So. 2d 515 (Fla. 3d DCA 1994)

1. The first issue for this Court to resolve is the standard that is required in determining "defalcation" under §523(a)(4). If there is a prior determination that there was a breach of fiduciary duty, the bankruptcy court then determines if the breach of fiduciary duty constitutes defalcation under §523(a)(4). Absent a breach of fiduciary duty, there can be no defalcation. Not every breach of fiduciary duty constitutes defalcation. *In re Baylis*, 313, F.3d 9, 18 (!st Cir. 2002) There is a balancing act between the"fresh start" policy inherent in the bankruptcy code and preventing certain obligations, as set forth in §523, from being discharged. See *Grogan v. Garner*, 498 U.S. 279, 286 (1991) upholding the "fresh start" policy. In furtherance of the "fresh start" policy the courts have developed certain legal maxims , *i.e.*, exceptions to discharge are narrowly construed *Century 21 Balfour Real Estate v. Menna,* 16 F.3d 7,9 (1st Cir. 1994); exceptions to discharge should be strictly construed *In re Fretz*, 244 F.3d 1323, 1327 (11th Cir. 2001); the burden of proof to establish defalcation is on the creditor *Century 21 Balfour Real Estate v. Menna, supra* at 9).

What standard should be used to determine defalcation? Judge Learned Hand held that defalcation is to be measured objectively. *Central Hanover Bank & Trust Co. v. Herbst*, 93 F.2d 510, 512 (2nd Cir. 1937). But the Circuit Courts of Appeal have yet to derive a uniform standard. Therefore, this Court must determine a standard for all circuits. The standard of measurement depends upon the circuit. The 1st circuit requires extreme recklessness, egregious conduct or breach of the duty of loyalty by the debtor. *Baylis* at 20. The 4th ,8th , 9th and 11th circuits' standard is that even an innocent mistake can constitute defalcation. *In re Uwimana,* 274 F. 3d 806 (4th Cir. 2001); *In re Cochrane*, 124 F. 3d 978 (8th Cir. 1997); *In re Lewis*,

97 F. 3d 1182 (9th Cir. 1996); *Quaif v. Johnson, 4 F3d. 950 (11th Cir. 1993)*. The 2nd, 5th, 6th and 7th circuits require at least reckless conduct by the debtor. *Herbst, supra; In re Schwager*, 121 F. 3d 177 (5th Cir. 1997); *In re Johnson*, 691 F. 2d 249 (6th Cir. 1982); *Meyer v. Rigdon*, 36 F. 3d 1375 (7th Cir. 1994). The 10th circuit requires, an intentional, wilful, reckless or negligent act . *In re Storie*, 216 B. R. 283 (B.A.P. 10th Cir. 1997).

The Florida appellate court determined in this case that the debtor's conduct was unreasonable[2].(Pet. App 19a.) Unreasonable conduct would not constitute defalcation in the 1st, 2nd, 5th, 6th , 7th and 10th circuits.

2. The second issue for this Court to resolve is the conflict between two competing hard and fast rules of law that are applied in bankruptcy cases dealing with §523(a)(4) where a state appellate court determines the factual issues which form the fiduciary relationship. The competing legal principles are collateral estoppel on the one hand and the bankruptcy court's authority to determine the legal question of dischargeability on the other.(Pet. App. 3a.). Under §523(a)(4), the bankruptcy court looks to state law to determine whether a fiduciary relationship exists. *In re Long*, 774 F. 2d 875, 878 (8th Cir. 1985); *Ragsdale v. Haller*, 780

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[2]At the trial, there was no evidence that Bookbinder and Co.s had knowledge that the debtor voluntarily made the first mortgage payment or that the payment was made and then recalled or that they relied on the fact that the first mortgage payment was made. The complaint filed by Bookbinder in the state court contained no allegations whatsoever of any payment made or that it was recalled.

F.2d 794 (9th Cir. 1986). And thereafter to federal law to determine whether the fiduciary relationship arises from an express trust, a technical trust or trust-type obligations under state statute or common law. *Quaif v. Johnson*, 4 F.3d 950 (11th Cir. 1993); *Matter of Bennet*, 989 F.2d 779 (5th Cir. 1993). The 11th Circuit Court of Appeals gave "lip-service" to the Florida appellate court's determination that the fiduciary relationship was impliedly formed, *i.e.*, by a voluntary act. It then concluded that the fiduciary relationship for purposes of §523(a)(4), was formed by contract, thus, completely disregarding the state appellate court's determination that the fiduciary relationship was formed by a voluntary act. Its holding was based upon its right "to determine the ultimate issue of dischargeability" (Pet. App.3a.). This broad power of the federal bankruptcy court should not be exercised to obviate a determination by a state appellate court which, under the principle of collateral estoppel, should have been given preclusive effect as to the issues previously decided. See *New Hampshire v. Maine*, 121 S. Ct. 1808, 149 L.Ed 2d 968 (U.S.2001); *Montana v. U.S.*, 440 U.S. 147 (1979); *Grogan v. Garner*, *supra*; *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1168 (5th Cir. 1981). *But see In re St. Laurent*, 991 F. 2d 672 (11th Cir. 1993)[3].

---

[3]Note: The bankruptcy court determined that the debtor was a fiduciary for purposes of §523(a)(4) because he was Bookbinder's escrow agent and attorney (Pet. App. 10a.). The evidence at the trial, which was reviewed by the Florida appellate court, included a document executed by Bookbinder which stated that Pleeter was not her attorney even though he had prepared documents for the closing and testimony from Bookbinder's expert witness who stated that she had introduced her husband as her attorney at the closing.

Review should be granted because questions presented are important and recurring because of the expansion of the law with respect to breach of fiduciary duty and the need for a "fresh start[4]."

Additional evidence included an affidavit executed by Bookbinder stating that she had no interest in the money recalled by Pleeter which was subsequently disbursed to a third party by court order in an interpleader action brought by Pleeter. The 11th Circuit Court of Appeals determined that Pleeter was a fiduciary for purposes of §523(a)(4) by virtue of a contract (Pet. App. 3a.). Both federal courts completely disregarded the determination of the Florida appellate court.

[4]At one time *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (N.Y.1928), (breach of duty of loyalty to a partner) controlled. Seventy-three years later, a Florida appellate court determining that a fiduciary relationship can result from a voluntary act greatly expanded the definition of fiduciary and breach of fiduciary duty. *Bracha Holding, Inc. vs. United States Small Business Administration,* 800 So. 2d 657 (Fla. 3d DCA 2001)

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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No._____

In The Supreme Court of the United States

LOUIS JOSEPH PLEETER,

Petitioner,

v.

KAREN BOOKBINDER,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-10672
Non-Argument Calendar

D.C. Docket Nos.
03-80653-CV-KLR & 02-33843 BKC-SH

IN RE: LOUIS JOSEPH PLEETER
Debtor

LOUIS JOSEPH PLEETER,
Plaintiff-Appellant,

versus

KAREN BOOKBINDER,
Defendant-Appellee

Appeal from United States District Court for the
Southern District

(OCTOBER 15, 2004)

Before ANDERSON, DUBINA and WILSON, Circuit Judges

PER CURIAM:

Appellant Louis Joseph Pleeter appeals the district court's affirmation of the bankruptcy court's grant of summary judgment in favor of Karen Bookbinder, Bashert Enterprises, Inc., and Eve Medical, Inc. ("Bookbinder plaintiffs") based on non-dischargeability of a debt. First, Pleeter argues that, based on the principles of collateral estoppel, the bankruptcy court was required to follow the state court's determination that the fiduciary relationship at issue was implied rather than express. Pleeter alleges that 11 U.S.C. §523(a)(4) only applies to express fiduciary relationships and, thus, the bankruptcy court was collaterally estopped from determining that the requirements of §523 were met. Citing caselaw from the First Circuit, Pleeter next argues that defalcation[1] requires a reckless and egregiuos breach and, because the state court only found that his actions were unreasonable, the standard was not satisfied. Finally, Pleeter argues that there are genuine issues of material fact with respect to the ownership of the funds at issue, whether Pleeter was acting as an attorney or escrow agent, and conflicts between the state appellate court and bankruptcy court findings.

---

[1]"Defalcation refers to a failure to produce funds entrusted to a fiduciary." *Quaif v. Johnson,* 4 F.3d 950, 955 (11th Cir. 1993). Defalcation need not rise to the level of fraud or misappropriation and may be an innocent act. *Id.*

"A debtor under Chapter 7 of the Banruptcy Code is generally granted a discharge from all debts that arose prior to the filing of the bankruptcy petition." *In re Fretz,* 244 F.3d 1323, 1326 (11th Cir. 2001). Section 523 of the Code, however, provides specific exceptions to the discharge of the debt, including an exception for any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C.§523(a)(4). Exceptions under this section are "strictly construed in favor of the debtor." *Fretz,* 244 F.3d 1327.

Where the debt at issue is a state court judgment, the state's collateral estoppel law is applied to determine whether the state court judgment has a "preclusive effect." *St. Laurant v. Ambrose,* 991 F.2d 672, 675-76 (11th Cir. 1993) (holding that collateral estoppel applied to a state court determination that fraud occurred). Although "collateral estoppel may bar a bankruptcy court from relitigating factual issues previously decide in state court. . . the ultimate issue of dischargeability is a legal question to be addressed by the bankruptcy court." *Id. at 676.*

For the purposes of §523(a)(4), to prevent discharge of a debt, a creditor must prove that there was a fiduciary relationship. *Quaif v. Johnson,* 4 F.3d at 952-55. Under federal bankruptcy law, the requisite fiduciary relationship exists where there is a voluntary trust created by contract. *Id.* at 954.

Because the record demonstrates that the state appellate court merely found that a fiduciary relationship existed where Pleeter voluntarily made the mortgage payment, the bankruptcy court was left to determine whether that fiduciary relationship satisfied the requirements of the bankruptcy code. Because there was a voluntary trust created by contract, a fiduciary relationship sufficient to satisfy the requirements of §523(a)(4) existed. Furthermore, because

the bankruptcy court must determine the ultimate issue of dischargeability and such a determination requires the court to address whether defalcation occurred, the state appellate court's failure to address the issue does not preclude such a finding by the bankruptcy court.

Furthermore, because Pleeter conceded that the funds were in his trust account and that he recalled the mortgage payment without authorization, the bankruptcy court properly concluded that defalcation occurred. Furthermore, because our precedent explicitly provides that defalcation may be innocent and the Supreme Court has not overruled that determination, there is no merit in Pleeter's contention that the First Circuit standard should apply.

We review the bankruptcy court's grant of summary judgment *de novo. In re Optical Technologies, Inc.*, 246 F.3d 1332, 1334-35 (11th Cir. 2001). The bankruptcy court may grant summary judgment where "there is no genuine issue as to any material fact and . . . The moving party is entitled to a judgment as a matter of law. *Id.* at 1334(quoting Fed.R.Civ.P.56(c)). All inferences must be made in favor of the non-moving party. *Id.* As discussed above, a debt may be excepted from discharge where there is a fiduciary relationship and the fiduciary commits defalcation. 11 U.S.C. §523(a)(4).

Because we conclude from the record that the bankruptcy court properly determined that Pleeter had a fiduciary responsibility and defalcation occurred and Pleeter had not pointed out any genuine issues of material fact sufficient to upset those findings, we affirm the district court's order affirming the bankruptcy court's grant of summary judgment in favor of the Bookbinder plaintiffs.

AFFIRMED.

Not Published

APPENDIX B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:

LOUIS JOSEPH PLEETER,

Case No.:02-33843-BKC-SHF
Chapter 7 Proceeding

Debtor.
_____/

KAREN BOOKBINDER,
BASHERT ENTERPRISES, INC.,
A Florida corporation and EVE
MEDICAL, INC. a Florida
Corporation,
Plaintiffs,

v. Adv. No.:02-3353-BKC-SHF-
A

LOUIS JOSEPH PLEETER,
Defendant.
_____/

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court upon consideration of the Defendant's Motion for Summary Judgment, filed by Louis Joseph Pleeter ("Pleeter"). On December 31, 2002, Pleeter filed the instant motion and his affidavit in support thereof. Thereafter, on January 24, 2003, Karen Bookbinder, Bashert Enterprises, Inc. and Eve.

Medical Corporation (collectively "the Plaintiffs") filed their Cross-Motion for Summary judgment and Supporting Memorandum and their Memorandum in Opposition to Pleeter's Motion for Summary Judgment. On the same date Plaintiffs also filed the Affidavit of Karen Bookbinder and Sworn Testimony of Louis J. Pleeter in Support of Plaintiff's Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment. On February 4, 2003, Pleeter filed his Reply to Plaintiffs' Memorandum in Opposition to his motion for summary judgment. Subsequently, on Fevruary 21, 2003, Pleeter filed his Response to Plaintiffs' Motion for Summary Judgment and Supporting Memorandum. On March 10, 2003, the Plaintiffs filed their Reply Memorandum Regarding Motion for Summary Judgment. Having considered both motions for summary judgment, the responses and the replies made thereto, and for the reasons discussed below, the Court **denies** Pleeter's Motion for Summary Judgment and **grants** the Plaintiffs' Motion for Summary Judgment.

On July 15, 2002, Pleeter filed a voluntary petition under Chapter 7 of the Bankruptcy Code. On November 22, 2002, the Plaintiffs commenced the above captioned adversary proceeding by filing their Complaint seeking a determination that the judgement debt Pleeter owes to the Plaintiffs is n0n-dischargeable under 11 U.S.C.§523(a)(4) as a debt for fraud or defalcation while acting in a fiduciary capacity. On December 31, 2002, Pleeter filed his Motion for Summary Judgment stating that there is no genuine issue of any material fact and claiming that he is entitled to summary judgment as a matter of law because no fiduciary relationship existed between himself and the Plaintiffs and thus 11 U.S.C.§523(a)(4) is not applicable to this case. On the other hand, on January 24, 2003, the Plaintiffs filed their cross-motion for summary judgment asserting that they are entitled to summary judgment as a matter of law because Pleeter's

debt to the Plaintiffs arises from Pleeter's defalcation while acting in a fiduciary capacity and is non-dischargeable under 11U.S.C.§523(a)(4).

It is undisputed that on July 6, 2002, the Circuit Court for Eleventh Circuit in and for Miami-Dade County, Florida entered a Final Judgment against Pleeter awarding the Plaintiffs $176,217.76 (the "Final Judgment"). The Final Judgment was entered pursuant to the jury's finding that "Defendant Louis J. Pleeter breached a fiduciary duty owed to Plaintiffs Karen Bookbinder, Bashert Enterprises, Inc., and Eve Medical Corporation." The Final Judgment was affirmed on appeal in *Bracha Holding, Inc. v. United States Business Administration, et. al,* 800 So.2d 657 (Fla.3d DCA 2001).

The Final Judgment arose from a November 30, 1992 real estate closing (the "Transaction"). At the closing of the Transaction, Seymour Deutsch ("Deutsch") sold three hotels on Miami Beach to his daughter, Karen Bookbinder ("Bookbinder"), for $5.1 million. Deutsch's corporation, Bracha Holding, Inc. ("Bracha"), was the seller, and Bookbinder took title to the three hotels in the name of her wholly owned corporation, Bashert Enterprises, Inc. ("Bashert"). First Wall Street SBIC, L.P. ("First Wall Street") provided financing for the Transaction. Bookbinder and Eve Medical Corporation guaranteed First Wall Street"s loan to Bashert. At all times, Bookbinder was the sole owner of both Bashert and Eve Medical Corporation.

Pleeter was the attorney representing First Wall Street in the Transaction. Pleeter also provided legal services to Bookbinder and Bashert by incorporating Bashert and serving as Bashert's initial registered agent. Pleeter prepared the closing documents for the Transaction, and he prepared a number of documents for the closing that were strictly between Bashert as buyer and Bracha as seller, including the Agreement for Sale and Purchase, the Bill of Sale, and a $2.1

million Promissory Note from Bashert to Bracha, and other documents to secure the Promissory Note. First Wall Street was not a party to those documents. The loan statement that Pleeter prepared included a statement that real estate escrow was disbursed "to Louis J. Pleeter, Escrow Agent," and a Compliance Agreement that Pleeter prepared referred to Pleeter as the "closing agent."

Ultimately, the funds to finance the Transaction were deposited into Pleeter's escrow account. In addition, $122,500.55 in funds that had been deposited in escrow with Schantz, Schatzman & Aaronson, P.A., in a prior transaction were transferred to Pleeter's escrow account, and Pleeter, Deutsch and Bookbinder signed an Escrow Agreement designating Pleeter as the "Escrow Agent for those funds. Shortly after the closing of the Transaction, Pleeter disbursed the funds from his escrow account, including a $1,522,416.63 check to First Wall Street.

After the closing of the Transaction, Pleeter held proceeds from th clsoing in his escrow account. Pleeter stated that he was holding the funds for Bookbinder and Deutsch until the two told him what to do with the funds. Pleeter testified that he thought the funds belonged to both Bookbinder and Deutsch. Pleeter was advised at the closing that, from the closing proceeds $100,000 was being left in his escrow account for the benefit of of Bookbinder to be used to cover her expenses to close the transaction. Deutsch and Bookbinder both directed Pleeter to pay the first mortgage payment with funds that he was holding in his trust account. Deutsch sent written authorization to Pleeter approving the disbursement, and Bookbinder verbally agreed that she would do the same. Accordingly, Pleeter made the first mortgage payment from the money he was holding in his trust account by forwarding the amount of the first payment to First Wall Street on January 12, 1993.

Subsequently, on January 27, 1993, Pleeter unilaterlly and without the authorization of Bashert or Bracha, instructed First Wall Street to return Bashert's first mortgage payment to Pleeter's escrow account. The return of the first mortgage payment created a default, and on February 2, 1993, First Wall Street sent Bashert a letter declaring th loan in default and declaring the entire principal balance of $2,450,000 plus interest immediately due.

Conclusions of Law:

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334,157(b)(1) and 157(b)(2)(1). This is a core matter in accordance with 28 U.S.C.§ 157(b)(2)(1).

Federal Rule of Civil Procedure 56(c), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Precedure 7056, provides that "the judgment sought shall be rendered forwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law."; *see also Celotex Corp. v. Carett,* 477 U.S. 317,322(1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242,247-8; *Rice v. Braniger Org., Inc.,* 922 F.2d 788 (11th Cir.1991); *In re Pierre,* 198 B.R.389 (Bankr.S.D. Fla.1996). Rule 56 is based upon the principle that if the court is made aware of the absence of genuine issues of material fact, the court should, upon motion, promptly, adjudicate the legal questions which remain and terminate the case, thus avoiding delay and expense associated with trial. *See United States v. Feinstein,* 717 F. Supp. 1552 (S.D.Fal. 1989). "Summary judgment is appropriate when, after drawing all reasonable inference in favor of the party against whom summary judgment is

sought, no reasonable trier of fact could find in favor of the non-moving party." *Murray v. National Broad Co.* 844 F.2d 988, 992(2d Cir. 1988).

The legal standard governing the entry of summary judgment has been articulated by the United Staes Supreme Court in *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986). In *Anderson* the Supreme Court stated that the standard for summary judgment mirrors the standard for directed verdict under Federal Rule of Civil Procedure 50(a), which provides that the trial judge must direct a verdict if there can be but one reasonable conclusion as to the verdict. *Id.* at 250. The Court explained that the inquiry under summary judgment and directed verdict are the same: "whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-2.

In order to defeat a motion for summary judgment under this standard, the non-moving party must do more than simply show that there is some doubt as to the facts of the case. *Id.* at 252. Rule 56 must be construed not only with regard to the non-moving party and that party's duty to demonstrate that the movant's claims have no factual basis. *Id.* "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could find for the [non-moving party]." *Id.* Thus, the non-moving party must establish the existence of a genuine issue of material fact and may not rest upon its pleadings or mere assertions of disputed fact to prevent a court's entry of summary judgment. See *First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253,289 (1968); *In re Pierre*, 198 B.R. 389 (Bankr. S.D. 1996).

The instant issue is whether a state court judgment against Pleeter is excepted from discharge pursuant to 11

U.S.C.§523(a)(2) [*sic*] where Pleeter was an attorney and escrow agent who failed to follow the Plaintiffs' instructions when he unilaterally and without the Plaintiffs' authorization instructed First Wall Street to return Bashert's first mortgage payment to his escrow account.

Section 523(a)(4) of the Bankruptcy Code provides that a discharge in bankruptcy "does not discharge an individual debtor from any debt for fraud or defalcation while acting in a fiduciary capacity . . ." 11U.S.C.§523(a)(4). In order for a debt to be non-dischargeable under the "defalcation" provision, the Court must find both that a fiduciary relationship existed and that a defalcation occurred. *In re Codias*, 78 B.R. 344, 346 (Bankr. S.D. Fla. 1987).

Sub judice, in a prior trial of an action that the Plaintiffs brought against Pleeter, a state court jury determined that there was a fiduciary relationship between Pleeter and the Plaintiffs and that Pleeter breached a fiduciary duty owed to the Plaintiffs. That finding was affirmed by the Third District Court of Appeal.

A question of fact "distinctly put in issue and directly determined by a court of competent jurisdiction. . . cannot be disputed in a subsequent suit between the same parties or their privies. . ." *Montana v. U.S.*, 440 U.S. 147, 153 (1979), quoting *Southern Pacific R. Co. v. U.S.* 168 U.S. 1, 48-49 (1897). Collateral estoppel bars re-litigation of previously adjudicated issues. *In re St. Laurent*, 991 F.2d 672-675 (11th Cir. 1993), citing *Allen v. McCurry*, 449 U.S. 90, 95 (1980). Collateral estoppel applies in bankruptcy dischargeability proceedings. *Id.*; *In re Touchstone*, 149 B.R. 721, 725 (Bankr. S.D. Fla. 1993). Where a prior judgment establishes each of the elements essential to deny discharge, the debtor is estopped by that judgment from re-litigating those facts in the bankruptcy court. In re Evans, 1 B.R. 229, 231 (Bankr.

S.D. Fla. 1979). As determined by the state court jury and upheld on appeal, Pleeter breached a fiduciary duty to the Plaintiffs while acting in a fiduciary capacity. Thus, the state previously determined that Pleeter indeed acted in a fiduciary capacity to the Plaintiffs, and that determination is entitled to collateral estoppel effect. See In re Postell, 132 B.R. 788 (Bankr. N.D. Ga. 1991) (granting summary judgment in favor of a creditor on holding that the factual issues relevant to the bankruptcy court adversary proceeding were identical to the issues determined in the state court litigation, therefore, debtor was estopped from denying dischargeability).

The remaining issue is whether Pleeter's breach of his fiduciary duty to Plaintiffs constitutes a defalcation so as to render his judgment debt to Plaintiffs non-dischargeable under 11 U.S.C.§523(a)(4). "Defalacation" has been defined as a failure to account for or produce funds entrusted to a fiduciary. *Quaif v. Johnson*, 4 F.3d 950, 955 (11th Cir. 1993); *In re Touchstone*, 149 B.R. at 728. Defalcation does not require the element of intent, and defalcation need not be intentional conduct, negligence or ignorance may be defalcation. *In re Codias*, 78 B.R. at 346. Indeed, defalcation does not require substantial culpability or misconduct. *In re Touchstone*, 149 B.R. at 728. Creating a debt by breaching a fiduciary capacity is sufficient to constitute defalcation even in the absence of bad faith. *In re Menendez*, 107 B.R. 789, 792 (Bankr. S.D. Fla. 1989).

The debt in question was created by Pleeter's breach of his fiduciary duties to the Plaintiffs. A debt for breach of fiduciary duties, even in the absence of bad faith, is sufficient to constitute defalcation. Pleeter committed a defalcation when he unilaterally and without authorization had First Wall Street return Bashert's first mortgage payment to

Pleeter's escrow account. Pleeter testified that he was holding those funds for Bookbinder and Deutsch and that they were to be disbursed pursuant to the agreement and direction of those two individuals. Although Bookbinder and Deutsch both directed Pleeter to use a portion of the escrow funds to make Bashert's first mortgage payment, Pleeter caused the loan to go into default by having the first mortgage payment returned to his escrow account without the knowledge or authorization of Bookbinder or Deutsch.

There is no issue of material fact as to Pleeter's breach of his fiduciary duty to the Plaintiffs.and thus no issue of material fact as to whether Pleeter committed a defalcation. Because no issues of material fact exist, the Plaintiffs are entitled to summary judgment as a matter of law.

Accordingly, it is

ORDERED that

(1) Pleeter's Motion for Summary Judgment is denied.

(2) The Plaintiffs' Motion for Summary Judgment is granted.

ORDERED in the Southern District of Florida this 3rd day of June, 2003

S/STEVEN H. FRIEDMAN
STEVEN H. FRIEDMAN
U.S. BANKRUPTCY JUDGE

293 B.R. 812 (Bnkr. S.D. Fla. 2003)

APPENDIX C

IN THE DISTRICT COURT OF APPEAL

OF

FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 2001

BRACHA HOLDING, INC., etc.,
Appellant

vs. CASE NO. 3DO-1588

UNITED STATES SMALL BUSINESS ADMINISTRATION, etc., et al., LOWER TRIBUNAL NO. 93-2692

Appellees

_____/

LOUIS J. PLEETER
Cross-Appellant,

vs.

KAREN BOOKBINDER, et al.
Cross-Appellees

Opinion filed November 7, 2001

An appeal from the Circuit Court for Miami-Dade County, Bernard S. Shapiro Judge.

Hollender & Bartlestone, P.A. and Ted H. Bartlestone, for appellant.

Cypen & Cypen and Myles G. Cypen, for appellee.

Louis J. Pleeter, in proper person.

Timothey H. Crutchfield, for cross-appellee.

Before COPE, GREEN and SHEVIN, JJ.

PER CURIAM.

This appeal and cross-appeal stem from a property transaction gone bad. In September, 1991, Bracha Holding, Inc. ("Bracha"), a Florida corporation, wholly owned by Seymour Deutsch ("Deutsch"), purchased the Maxine Hotel ("Maxine") in Miami Beach. The Maxine was adjacent to two other hotels that Bracha owned and sought to refinance. First Wall Street SBIC, L.P. ("First Wall Street"), a small business investment company licensed by the United States Small Business Administration, financed the purchase of the Maxine and paid off the mortgages of the other hotels, thereby financing $1.475 million for Bracha. The promissory note for this deal was collateralized by a mortgage pn the three hotels plus three other hotels that were owned by Deutsch. Deutsch and his wife also personally guaranteed the loan, and First Wall Street received a warrant to purchase 10% of Bracha's shares. Alan Farkas was the president of First Wall Street Management Co., Inc., and the general partner of First Wall Street. Farkas was the only person who acted on behalf of First Wall Street in its transaction with Bracha. Bracha and First Wall Street also entered into an agreement wherein First Wall Street was to provide management and consulting services to Bracha.

In August 1992, Deutsch and Farkas discussed First Wall Street's financing of a sale of the three Bracha hotels to Deutsch's daughter, Karen Bookbinder. First Wall Street agreed to provide all of the financing Bookbinder needed to purchase the hotels. Bracha sold the three hotels to Bookbinder for $5.1 million. Bookbinder took title of the hotels in the name of her wholly owned corporation, Bashert Enterprises, Inc. ("Bashert"). At closing, First Wall Street

loaned Bashert $2.45 million, secured by a mortgage on the three hotels. The balance of the purchase price was financed by a $2.1 million purchase money junior mortgage that Bashert gave to Bracha and $600,000 of existing mortgages that Bashert also assumed. Bookbinder and Eve Medical Corporation, another corporation wholly owned by Bookbinder, guaranteed the loan. The closing documents showed no cash to Bashert for working capital. Instead, Deutsch authorized Louis J. Pleeter, the attorney for First Wall Street, to hold $100,000 of Bracha's sale proceeds in trust to pay Bashert's $59,000 closing fees.

When the first installment of the mortgage came due, Bookbinder failed to make payment. Deutsch, holding a junior mortgage on the properties, asked Pleeter to pay the firs installment from the remaining $41,000 that Pleeter was holding in trust. Pleeter asked both Deutsch and Bookbinder to authorize the disbursement of the funds in writing. Deutsch sent a written authorization and Bookbinder verbally agreed that she would do the same. Pleeter then wired the mortgage payment to First Wall Street. When Pleeter did not receive Bookbinder's written authorization, He unilaterally and without authorization of either Bashert or Bracha, called First Wall Street and instructed it to return the mortgage payment. A week later, after receiving no payment, First Wall Street declared the loan in default, accelerated the balance due and demanded full payment.

Thereafter, First Wall Street filed a complaint against Bashert to foreclose its mortgage on the three hotels. Bracha was joined as a defendant in the action as a junior lien holder; Bookbinder and Eve were also joined in the action as guarantors of the loan. Instead of timely filing counterclaims in its foreclosure action, the defendants elected to bring this independent action. Bracha sought damages for breach of the consulting contract against First Wall Street and Farkas,

individually. Bashert[1] also sued First Wall Street and Farkas for fraud and breach of fiduciary duty. They all sued Pleeter for legal malpractice and breach of fiduciary duty.

Bracha and Bashert jointly answered First Wall Street's foreclosure complaint, initially bringing no counterclaims. Bashert amended its answer before trial and "recast" its affirmative defenses as counterclaims. Bracha did not seek to bring any counterclaim in the foreclosure action until the day of the trial. The trial court denied Bracha leave to amend at that late date. The foreclosure action was tried and a final judgment was entered in favor of First Wall Street, foreclosing the mortgage, extinguishing Bracha's junior mortgage and dismissing Bookbinder's counterclaim with prejudice. The judjugment was affirmed by this court, without opinion. See Bashert Enterp.,Inc. v. First Wall Street, SBIC, L.P., 655 So. 2d 159 (Fla.3d DCA 1995).

Thereafter, Bashert and Bracha moved forward with this underlying suit and filed a second amended complaint. Bracha amended its complaint further to add a claim against First Wall Street and Farkas for breach of fiduciary duty. First Wall Street raised the affirmative defenses of res judicata and collateral estoppel aring from the foreclosure judgment. First Wall Street moved for summary judgment against the plaintiffs. The trial court entered summary judgment in favor of First Wall Street against Bashert, but allowed Bracha's claim against First Wall Street to continue. The case proceeded to a non-jury trial on Bracha's claims against First Wall Street and a jury trial on the plaintiffs' claims against Pleeter and Farkas. Farkas did not appear at trial and, upon Bracha's motion, the trial court entered a

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[1] With regard to these suits, Bashert, Bookbinder and Eve will collectively be referred to as Bashert.

default judgment against him. The court instructed the jury by interrogatory verdict, to determine the amount of damages that Bracha and Bashert had sustained as a result of Farkas' fraud and breach of fiduciary duty. The jury found Farkas liable to Bracha on the fraud count in the amount of $1,000,000 and $975,000 on the breach of fiduciary claim. The trial court entered a final judgment, including pre-judgment interes, in favor of Bracha for $3,487,755.79. The jury found that Pleeter was liable to Bashert for breach of fiduciary duty in the amount of $100,000. After awarding pre-judgment interest from the date that the mortgage was declared in default, the trial court entered a final judgment aginst Pleeter in the amount of $176,216.76., which is the subject matter of Pleeter's cross-appeal. The trial court also entered a final judgment in favor of First Wall Street on all of Bracha's claims.

The claims raised in Bracha's second amended complaint were virtually identical to its answer and affirmative defenses raised in the foreclosure proceeding. Thus, we find that they were barred from being raised in a subsequent suit. See Simco Operating Corp. v. City Nat'l Bank of Miami Beach, 341 So. 2d 232, 234 (Fla. 3d DCA 1976) (where plaintiff filed an answer and affirmative defenses in prior foreclosure proceedings which were virtually the same as allegations set forth in plaintiff's subsequent complaint, plaintiff's subsequent suit was barred by doctrine of "estoppel by judgment."). Moreover, all of the claims raised here should have been raised by Bracha as compulory counter-claims in the foreclosure action. Since they were not they are waived. See Londono v. Turkey Creek, Inc., 609 So. 2d 14, 19 (Fla. 19920) (failure to raise compulsory counter-claim in first suit results in a waiver of that claim). Accordingly, since Bracha's claims were barred/waived prior to trial, the final judgment in favor of

First Wall Street was proper on this ground, and we affirm. See Combs v. State, 436 So. 2d 93, 96 (Fla. 1983) (where trial court reached right result albeit for wrong reasons, affirmance is proper); Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979) (a conclusion of trial court will generally be affirmed if alternative theory supports it).

On his cross-appeal, Pleeter claims that the jury verdict and subsequent final judgment must be reversed because there was no competent substantial evidence to establish that he had a fiduciary relationship to Bashert. We disagree. When Pleeter voluntarily paid the mortgage installment on Bashert's behalf, he assumed a duty to act prudently. See e.g., Sanderson v. Eckerd Corp., 780 So. 2d 930, 932 (Fla. 2001). See also Capital Bank v. MVB, Inc., 622 So. 2d 515, 518 (Fla. 3d DCA 1994) ("Fiduciary relationships are either expressly or impliedly created . . . Fiduciary relationships implied in law are premised upon the specific factual situation surrounding the transaction and the relationship of the parties."). Thus, the jury, when faced with the evidence that Pleeter independently "recalled" the payment without notifying Bashert that no payment had been made, could reasonably have found that Pleeter acted unreasonably and breached a fiduciary duty that caused Bashert damages. Accordingly, we affirm. See Grossman v.Sea Air Towers, Ltd., 513 So. 2d 686, 688 (Fla.3d DCA 1987) (a jury verdict which is supported by the record will not be disturbed on review).

Finding no merit in the other arguments raised in the appeal and/or cross-appeal, we affirm.

Affirm.

800 So. 2d 657 (Fla. 3d DCA 2001)

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-10672-GG

IN RE: LOUIS JOSEPH PLEETER

Debtor.

LOUIS JOSEPH PLEETER,

Plaintiff-Appellant,

versus

KAREN BOOKBINDER,

Defendant-Appellee

On Appeal from United States District Court for the
Southern District of Florida

BEFORE: ANDERSON, DUBINA and WILSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

S/ JOEL F. DUBINA
UNITED STATES CIRCUIT JUDGE

Filed November 23, 2004

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH

Case No. 03-80653-CIV-RYSKAMP/VITUNAC
Bankruptcy No. 02-33843-BKC-SHF
Adv. pro. No. 02-3353-BKC-SHF-A

In Re:
LOUIS JOSEPH PLEETER,
Debtor,
_____/
KAREN BOOKBINDER,
BASHERT ENTERPRISES, INC.,
A Florida corporation and
EVE MEDICAL, INC.,
A Florida corporation,
Plaintiffs, Appellees,
v.

LOUIS JOSEPH PLEETER,
Defendant, Appellant.
_____/

ORDER AFFIRMING BANKRUPTCY COURT'S ORDER OF SUMMARY JUDGMENT

THIS CAUSE comes upon Appellant's appeal **[DE 1]** of the decision granting Plaintiff's Motion for Summary Judgment and denying Defendant's Motion for Summary Judgment entered by United States Bankruptcy Judge Steven H. Friedman on June 3, 2003. Appellant filed his Initial Brief **[DE 3]** on July 21, 2003. Appellees filed their Answer

[**DE 9**] on August 29, 2003, and Appellant filed his Reply Brief [**DE 13**] on September 9, 2004. After consideration of the briefs, the pertinent portions of the record, and the arguments presented by the parties, it is hereby

ORDERED AND ADJUDGED that the decision entered on June 3, 2003 is AFFIRMED on the basis of the well-reasoned order of the bankruptcy judge.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 12 day of January, 2004

S/KENNETH L. RYSKAMP
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE